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Chan Pooi Leng v Jabatan Ketua Pengarah Tanah Dan Galian Persekutuan Unit Pembahagian Pusaka Perak Timur, Pejabat Tanah/Daerah, 33000 Kuala Kangsar (Mohamad Iqbal Shah bin Abdullasah, intervener/applicant)

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HIGH COURT (IPOH) — APPEAL NO 16–12 OF 2005
LEE SWEE SENG JC
C 21 JANUARY 2014

Land Law — Sale of land — Bare trust — Deceased vendor entered into agreement to dispose of his interest said land — Whether appellant had proved that
D *deceased purchaser had paid full purchase price on balance of probabilities — Whether deceased vendor bare trustee for deceased purchaser — Whether limitation applies in circumstances of case to prevent application for administration of estate*

E One Abdullasah a/l Abdul Rahim ('the vendor') was the registered owner of pieces of land ('the said land'). The title was only issued in 1988. However on 13 August 1976, he had signed a sale and purchase agreement ('SPA') to dispose of the said land of about 6.2 acres to one Chan Hon Seng ('the purchaser'). In the SPA, it was stated that the vendor had in 1966, willingly gave the said land
F to the purchaser to cultivate and develop it; and that the purchaser had since cultivated the said land with his own money and expenses and the rubber trees on the said land were then about ten years old. When the vendor and purchaser died, the said land was transferred to the deceased purchaser, the father and administrator of the estate of the purchaser. On or about 23 March 2004, the
G appellant made an application to the respondent under s 8 of the Small Estates (Distribution) Act 1955 for administration and distribution of the said land, as an administrator of the deceased purchaser's estate. At the hearing of the distribution application, the respondent granted administration of the deceased vendor's estate to the intervener/applicant, a son of the deceased
H vendor. The appellant duly filed a notice of appeal to the High Court against the decision of the respondent in granting administration to the intervener/applicant. By a consent order, the judicial commissioner granted administration of the deceased vendor's estate to the appellant but limited to the said land. The appellant did not make the applicant a party to the appeal
I and was subsequently registered as an administrator on the title to the said land. It was not until 26 February 2013 that the intervener/applicant filed an application for, inter alia, to be made and intervener (an intervener?). The issues that arose in this case were whether the intervener/applicant was guilty of inordinate delay with latches operating against him in his applying to set aside

the order of court; whether the deceased vendor can enter into an agreement to dispose of his interest in the said land by agreement of 13 August 1976 when he only became registered owner of the said land when the title was issued on 14 September 1988; whether based on the balance of probabilities the appellant had proved that the deceased purchaser had paid the full purchase price of the said land to the deceased vendor; whether the deceased vendor was a mere bare trustee for the deceased purchaser; and whether limitation applies in the circumstances of the case to prevent the appellant from applying for administration of the estate.

Held, allowing the appeal with costs of RM5,000:

(1) There were certainly no merits with respect to the first delay of four years on the ground of the need to gather documents. Surely the appeal to the High Court must be based on the evidence that the applicant had led before the collector in the small estate distribution hearing. There was no dispute that the said land was still registered in the deceased vendor's name. There was nothing new that the applicant had adduced. Even the evidence that the applicant had paid the quit rent for the years 1992 to 2003 of RM62.50 per year that had already been adduced before the collector. The appellant had paid for the quit rent for the year 2004 and 2005 after the application was made by the appellant for the administration of the deceased vendor's estate (see paras 15–16).

(2) The deceased vendor had sufficient interest in the said land to dispose of it to the deceased purchaser. The land office recognised the deceased vendor's interest in the said land as can be clearly seen in the fact that when the then collector issued its letter to the deceased vendor and asked for payment of premium for the said land and development expenses of RM7,280. There was no reason to doubt that those payments were effected by the deceased purchaser as the appellant had exhibited the receipts for the payments. The court could take cognisance of the fact that receipts for any payments effected to any government departments would normally be issued in the name of the person whose name is registered as the owner of the land or premises. The fact that those receipts were in the possession of the appellant speaks volume of the more than certain likelihood on the balance of probabilities that the deceased purchaser had effected the said payments (see para 38).

(3) Having regard to s 90 of the Evidence Act 1950, the court may presume the genuineness of the signatures of the purported vendor and purchaser and the thumbprint of the purported person who witnessed the execution of the agreement. The document was executed by the plaintiff's father and the first defendant's father as shown in the agreement, considering that the document does appear to have an honest face (see para 47).

(4) The purchaser here had also entered into occupation, possession and even cultivation of the said land with rubber trees. There was no hesitation that in the circumstances of the case, the deceased vendor was a bare trustee for the deceased purchaser. An application for administration of the estate of a deceased is not an action to recover land. In any event the deceased purchaser and his administrator in the appellant were in possession of the said land (see paras 55 & 57).

[Bahasa Malaysia summary

Seorang Abdullasah a/l Abdul Rahim ('penjual') adalah pemilik berdaftar beberapa bidang tanah ('tanah tersebut'). Hakmilik hanya dikeluarkan pada tahun 1998. Walau bagaimanapun pada 13 Ogos 1976, dia telah menandatangani perjanjian jual beli ('PJB') untuk melepaskan tanah tersebut lebih kurang 6.2 ekar kepada seorang Chan Hon Seng ('pembeli'). Dalam PJB tersebut, adalah diperuntukan bahawa penjual telah pada tahun 1996, secara sukarela memberikan tanah tersebut kepada pembeli untuk mengusahakan dan membangunkannya; dan bahawa pembeli semenjak mengusahakan tanah tersebut dengan wang dan perbelanjaannya sendiri dan pokok getah di atas tanah tersebut pada masa itu lebih kurang 10 tahun. Apabila penjual dan pembeli meninggal dunia, tanah tersebut dipindahkan kepada si mati pembeli, bapa dan pentadbir estet pembeli. Pada atau 23 Mac 2004, perayu telah membuat permohonan kepada responden di bawah s 8 Harta Pusaka Kecil (Pembahagian) 1955 bagi pentadbiran dan pembahagian tanah tersebut, sebagai pentadbir harta pusaka pembeli yang sudah mati. Pada perbicaraan permohonan pembahagian itu, responden memberikan pentadbiran harta pusaka si mati penjual kepada pencelah/pemohon, anak si mati penjual. Perayu memfailkan notis rayuan ke Mahkamah Tinggi terhadap keputusan responden memberikan pentadbiran kepada pencelah/pemohon. Melalui perintah persetujuan, pesuruhjaya kehakiman memberikan pentadbiran estet si mati penjual kepada perayu tetapi terhad kepada tanah tersebut. Perayu tidak membuat pemohon sebagai satu pihak kepada rayuan dan seterusnya berdaftar sebagai pentadbir kepada hakmilik tanah tersebut. Hanya pada 23 Februari 2013 pencelah/pemohon memfailkan permohonan untuk, antara lain, dijadikan sebagai pencelah. Isu yang timbul dalam kes ini adalah sama ada pencelah/pemohon bersalah untuk kelewatan melampau dengan latches berjalan terhadapnya dalam permohonannya untuk mengetepikan perintah mahkamah; sama ada si mati penjual boleh memasuki perjanjian untuk melepaskan kepentingannya dalam tanah tersebut melalui perjanjian 13 Ogos 1976 apabila dia hanya menjadi pemilik berdaftar tanah tersebut apabila surat hakmilik dikeluarkan pada 14 September 1988; sama ada berdasarkan imbangan kebarangkalian perayu telah membuktikan bahawa si mati pembeli telah membayar harga belian penuh tanah tersebut kepada si mati penjual; sama ada si mati penjual adalah hanya pemegang amanah untuk si mati pembeli; dan sama ada had masa terpakai dalam keadaan kes untuk menghalang perayu daripada memohon pentadbiran estet.

Diputuskan, membenarkan tuntutan dengan kos sebanyak RM5,000

(1) Sesungguhnya tiada merit berkaitan dengan kelewatan pertama selama empat tahun atas alasan keperluan untuk mengumpul dokumen. Tentunya rayuan ke Mahkamah Tinggi perlulah berdasarkan keterangan bahawa perayu telah didengar di hadapan pemungut dalam perbicaraan pembahagian harta pusaka kecil. Tiada pertikaian bahawa tanah tersebut masih didaftarkan atas nama si mati, penjual. Tiada apa yang baharu yang telah dikemukakan oleh pemohon. Malah keterangan bahawa pemohon telah membayar cukai tanah bagi tahun 1992 hingga 2003 sebanyak RM62.50 setahun, telah dikemukakan oleh pemungut. Perayu telah membayar cukai tanah bagi tahun 2004 dan 2005 selepas permohonan dibuat oleh perayu untuk mentadbir estet si mati penjual (lihat perenggan 15–16).

(2) Si mati penjual mempunyai kepentingan yang mencukupi dalam tanah tersebut untuk melepaskannya kepada si mati pembeli. Pejabat tanah mengiktiraf kepentingan si mati penjual dalam tanah tersebut seperti yang dijelaskan dalam fakta apabila pemungut mengeluarkan suratnya kepada si mati penjual dan meminta bayaran premium untuk tanah tersebut dan perbelanjaan pembangunan sebanyak RM7,280. Tiada alasan untuk meragui bahawa bayaran tersebut telah dibuat oleh si mati pembeli memandangkan perayu telah mengekshibitkan resit untuk pembayaran. Mahkamah boleh mengambil kira fakta bahawa resit untuk bayaran yang dibuat kepada apa-apa jabatan kerajaan selalunya diisukan atas nama individu yang namanya didaftarkan sebagai pemilik tanah atau premis. Fakta bahawa resit tersebut dalam milikan perayu menunjukkan dengan jelas atas imbangan kebarangkalian bahawa si mati pembeli telah membuat bayaran itu (lihat perenggan 38).

(3) Berkenaan s 90 Akta Keterangan 1950, mahkamah boleh menganggap ketulenan tandatangan penjual dan pembeli dan cap ibu jari orang yang dikatakan yang menyaksikan pelaksanaan perjanjian. Dokumen dilaksanakan oleh bapa plaintif dan bapa defendan pertama sebagaimana ditunjukkan dalam perjanjian, mengambil kira bahawa dokumen itu tulen secara zahirnya (lihat perenggan 47).

(4) Pembeli juga telah memasuki pendudukan, pemilikan dan pengusahaan atas tanah tersebut dengan pokok getah. Tiada keraguan bahawa dalam keadaan kes ini, si mati penjual adalah hanya pemegang amanah untuk si mati pembeli. Satu permohonan untuk pentadbiran estet si mati bukanlah tindakan untuk mengambil kembali tanah. Dalam apa-apa jua keadaan si mati pembeli dan pentadbirnya perayu mempunyai milikan terhadap tanah tersebut (lihat perenggan 55–57).]

Notes

For cases on bare trust, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4626–4627.

Cases referred to

Abdul Razak Sheikh Mahmood & Anor v Bhupinder Singh s/o Avtar Singh & Ors [2012] 3 MLJ 348 ; [2012] 2 AMR 129, HC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor [2007] 1 MLJ 101, CA (refd)

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)

Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218, HL (refd)

Ghazali bin Arifin v Ahmad bin Bakar & Ors [1992] 1 MLJ 282, HC (refd)

Hon Ho Wah & Anor v United Malayan Banking Corp Bhd [1994] 2 MLJ 393, SC (refd)

Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 MLJ 209, CA (refd)

Len Chee Omnibus Co Ltd Chin Sow Lan, in re v Lee Chee Omnibus Co Ltd & Ors; in re [1969] 2 MLJ 202 (refd)

Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221, PC (refd)

Ong Ah Goh v Kuan Keh Lan & Ors [1968] 2 MLJ 57 (refd)

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324; [2001] 1 CLJ 779, CA (refd)

Tengku Mariah binte Sultan Sulaiman v Halimah binte Abdullah [1980] 2 MLJ 234, FC (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)

Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182; [1978] 1 LNS 244, FC (refd)

Legislation referred to

Evidence Act 1950 s 90
Limitation Act 1953 ss 9(1), 22(1), 22(1)(b), 32
Malay Reservations Enactment (FMS Cap 142) s 13
Rules of the High Court 1980 O 42 r 13
Rules of Court 2012 O 3 r 5(1), O 42 r 13, O 92 r 4
Selangor Registration of Titles Regulation 1891 s 4
Small Estates (Distribution Act) 1955 ss 8, 29(4)

MS Raman (Thevin Chandran & Assoc) for the appellant.
Geetha Jura Singh (Federal Counsel, Attorney General's Chambers) for the respondent.
Hazlan bin Abd Hamid (Iszam Kamal & Hazlan) for the intervener/applicant

Lee Swee Seng JC:

[1] Abdullasah a/l Abdul Rahim ('the vendor') was the registered owner of all that piece of land held under HS(M) 94/88, No PT Lot 7092, Mukim Lenggong, Daerah Hulu Perak, Negeri Perak ('the said land'). The title was only issued in 1988. However on 13 August 1976, he had signed a sale and purchase agreement to dispose of the said land of about 6.2 acres to one Chan Hon Seng ('the purchaser') for a purchase price of RM7,000 which consideration was said to be fully paid in the agreement as well as in a statutory declaration signed by the vendor of the same date and a receipt also signed by the vendor of the same date.

[2] It was also stated in recital 2 to the sale and purchase agreement that the vendor had in 1966, willingly gave the said land to the purchaser to cultivate and develop it. It further stated that the purchaser had since cultivated the said land with his own money and expenses and the rubber trees on the said land were then about ten years old.

PROBLEM

[3] The vendor died on 19 January 1992 and the purchaser died on 7 September 1998 without the said land having been transferred to the deceased purchaser.

[4] The appellant Chan Pooi Leng, was the father of the deceased purchaser, and administrator of the estate of the deceased purchaser. On or about 23 March 2004, the appellant made an application to the respondent under s 8 of the Small Estates (Distribution) Act 1955 for administration and distribution of the said land, as an administrator of the deceased purchaser's estate. At the hearing of the distribution application, the respondent granted administration of the deceased vendor's estate to the intervener/applicant, a son of the deceased vendor.

[5] The appellant duly filed a notice of appeal to the High Court against the decision of the respondent in granting administration to the intervener/applicant. By a consent order dated 8 March 2006 in the appeal, the then learned judicial commissioner, granted administration of the deceased vendor's estate to the appellant but limited to the said land. The appellant did not make the applicant a party to the appeal and neither were the appeal papers served on the applicant. Learned counsel for the respondent, Ms Geetha Jura Singh, admitted that the papers for the appeal should have been served on the applicant here.

[6] At any rate, the said consent order was duly served on the intervener/applicant on 26 April 2006. The appellant was subsequently registered as an administrator on the title to the said land.

[7] It was only on 1 March 2010 that the intervener filed an application for leave to intervene in the matter (encl 12). Leave to intervene was granted on 31 May 2011.

PRAYER

[8] It was not until 26 February 2013 that the intervener/applicant filed an application for, inter alia, the following:

(a) that the intervener be granted leave and an extension of time to file this notice of application under O 3 r 5(1) of the Rules of Court 2012; and

(b) that the consent judgment dated 8 March 2006 be set aside under O 42 r 13 and under O 92 r 4 of the Rules of Court 2012.

PRINCIPLES

Whether the intervener/applicant was guilty of inordinate delay with latches operating against him in his applying to set aside the order of court dated 8 March 2006 only on 26 February 2013

[9] The appellant had made an application on or about 23 March 2004 under s 8 of the Small Estate (Distribution) Act 1955 for the distribution of the said land as the administrator of the estate of the deceased purchaser with respect to the said land registered in the deceased vendor's name. It reads as follows:

> Section 8 Petition for distribution
>
> *Where any person has died intestate leaving a small estate, any person claiming to be interested in the estate as* a beneficiary, or a creditor, or a purchaser, or in the circumstances mentioned in section 18(1) the penghulu or a Settlement Officer of the district or of the locality in which any land of which the deceased was the proprietor is situated, or the Official Administrator, *may lodge with the collector having jurisdiction under section 4 a petition, in the prescribed form, for the distribution of the estate*. (Emphasis added.)

[10] The respondent dismissed the appellant's application and instead granted administration of the deceased vendor's estate to the intervener/applicant. From that decision, the appellant appealed to the High Court.

[11] At the hearing of the appeal, a consent order was entered into on 8 March 2006, wherein the learned judicial commissioner granted administration of the deceased vendor's estate to the appellant but limited it to the said land. The said consent order was duly served on the intervener on 26 April 2006 (exh MIS 5 in encl 13).

[12] Inspite of the service of the said consent order on the intervener and with that the intervener had knowledge of the terms of the consent order, the intervener did nothing until 1 March 2010 when he filed an application for leave to intervene in the proceeding. Leave was granted on 31 May 2011. However no application was filed to set aside the consent order until 26 February 2013.

[13] Encik Hazlan for the applicant admitted that there was a delay of about seven years from the date the consent order dated 8 March 2006 was served on 26 April 2006. He said that his client had to gather documents to make the relevant application to intervene in the proceeding and to set aside the consent order. After the leave was granted, the delay was because the appellant was appealing against the leave granted to the Court of Appeal.

[14] That itself is woefully inadequate to explain the delay of about four years from the date of service of the consent order to the date of filing of the application to intervene and another two years of delay from date of the granting of leave to intervene on 31 May 2011 to 26 February 2013, the date of filing of the application to set aside the consent order. The explanation for the delay is more of an excuse and it is both flimsy and frivolous.

[15] There is certainly no merits with respect to the first delay of four years on the ground of the need to gather documents. Surely the appeal to the High Court must be based on the evidence that the applicant had led before the collector in the small estate distribution hearing. There is no dispute that the said land was still registered in the deceased vendor's name. There was no fresh evidence to be adduced that was not already adduced by the applicant before the collector. The appellant had adduced evidence at the appeal in the High Court the sale and purchase agreement of 13 August 1976 signed by both the deceased vendor and the deceased purchaser (exh CCK3 encl 15), the receipt for the sum of RM7,000 being the full sale price for the said land dated the same date (exh CCK9 encl 15), the letter from the land office dated 19 December 1978 requesting for various payments to be made including development expenses of RM2,280 to be paid commencing January 1979 for the next ten years (exh CCK10 encl 15), the receipts showing the payments made for the ten years from 1979–2008 (exh CCK11 encl 15).

[16] There was nothing new that the applicant had adduced. Even the evidence that the applicant had paid the quit rent for the years 1992–2003 of RM62.50 per year, that had already been adduced before the collector as can be seen in the reasons for the collector's decision in exh MIS–4 encl RF7. It was also noted that the appellant had paid for the quit rent for the year 2004 and 2005 after the application was made by the appellant for the administration of the deceased vendor's estate.

[17] There was a further delay of another two years from date of the granting of the leave to the filing of the application to set aside the consent order. Surely the fact that the appellant was appealing against that order granting leave to intervene cannot be a valid ground for delay in applying to set aside the consent order.

[18] The truth of the matter was that the applicant was fighting the battles at various fronts and strategising as to which would be more effective and in the process there was delay in filing the application to set aside after the various strategies proved futile and fruitless. Soon after the consent order was served on the applicant on 24 April 2006, the applicant lodged a caveat against the said land on 8 June 2006. The appellant filed an Originating Summons ('OS') No 24–131 of 2007 in the Ipoh High Court, naming the applicant as the First respondent. There was an affidavit filed by the applicant dated 3 July 2008 to oppose the application by the appellant to remove the caveat. The said caveat was removed by an order of court dated 30 June 2009 with an order for damages to be assessed and costs. In the intitulement to the OS appearing in exh CCK2 in encl 15 is stated, inter alia, the fact of the consent order dated 8 March 2006. There was no appeal against the said decision. Neither was there any suit filed by the applicant against the appellant to prosecute his claim after lodging his caveat on the said land.

[19] There was another suit filed in early 2010 in Suit No 22–47 of 2010 in the Ipoh High Court by the applicant together with other beneficiaries of the deceased vendor's estate against the appellant as administrator of the deceased purchaser's estate for, inter alia, a declaration that the sale and purchase agreement made between the deceased vendor and the deceased purchaser be declared null and void. That suit was dismissed on 12 September 2012 and there was no appeal against such a dismissal.

[20] The applicant said the application to set aside the consent order was filed only on 26 February 2013 after the appellant's appeal against the granting of the leave to intervene by the applicant was dismissed by the Court of Appeal on 30 November 2012. It would be more correct to say that the frontal attack and action against the appellant in Suit No 22–47 of 2010 having been

dismissed on 12 September 2012, there was still that last straw to clutch in filing the application to set aside the consent order and so that was filed, though belatedly, on 26 February 2013.

[21] Viewed in its proper context, the applicant had no problem filing his affidavit dated 3 July 2008 to oppose the removal of his caveat on the said land by the appellant. It is difficult to believe the applicant when he said that he could only file the application to intervene on 1 March 2010 on ground of trying to gather all documents. No documents were identified which was so crucial and critical that without them, the application to intervene could not be filed. Even if the applicant had gone to the office of the assistant state legal advisor to enquire as to why he had consented to the appeal by the appellant in the absence of the applicant, upon getting what the applicant said was an unsatisfactory explanation, the applicant should have filed his application to intervene promptly and with all due diligence.

[22] The doctrine of laches has been succinctly summarised by the judicial committee of the Privy Council in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at pp 239–240 as follows:

> The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. *Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval*, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy. (Emphasis added.)

[23] The doctrine of laches has been applied by our courts in varying circumstances to deprive a claimant of his claim where it would be unjust to give him a remedy. In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324; at pp 326–327 [2001] 1 CLJ 779 pp 802–803, His Lordship Gopal Sri Ram JCA referred to the case of *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 where the above dicta was cited with approval.

[24] Section 32 of the Limitation Act 1953 expressly permits the court to apply the doctrine of acquiescence and laches in refusing relief in situations that would justify such a refusal. It reads:

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> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

B

[25] In *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182; [1978] 1 LNS 244, His Lordship Hashim Yeop Sani J (as he then was) held as follows:

C

> Apart from mere denial that there was any trust involved in respect of the property in question express or implied it is also a basis of the defence that the plaintiff company's claim is barred by limitation and or by laches or acquiescence. Since the claim is based on an alleged implied trust and for the recovery of the trust property and that the plaintiff company is a beneficiary under the trust s 22(1) of the Limitation Ordinance 1953 excludes the period of limitation of action prescribed by that Ordinance. No statutory period of limitation would apply to an action by a beneficiary if it can be shown that the action is under a trust and for the recovery from the trustee of trust property previously received but converted to his use. That leaves us only with the question of laches and acquiescence. Section 32 of the Limitation Ordinance 1953 *provides that nothing in that Ordinance shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise*.

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E

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> To set out the general principles first, *it is an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. A Court of equity would refuse its aid to stale demands, ie where the plaintiff has slept upon his right and acquiesced for a great length of time. For 'laches' literally means negligent inactivity*. He is then said to be barred by his laches. (*Halsbury*'s (3rd Ed Vol 14), p 641). In determining whether there has been such delay as to amount to laches the main points to be considered are *acquiescence on the part of the plaintiff* and secondly *whether any change of position has occurred on the defendant's part*. Of course acquiescence depends on 'knowledge, capacity and freedom'. It is not necessary however that the plaintiff should have known the exact relief to which he was entitled. As regards the change in the defendant's position regard must be had whether the defendant has lost the evidence necessary for meeting the claim, for a Court of equity will not allow a dormant claim to be set up when the means of resisting it have perished. (Emphasis added.)

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[26] *In Re Len Chee Omnibus Co Ltd Chin Sow Lan v Lee Chee Omnibus Co Ltd & Ors* [1969] 2 MLJ 202 the High Court refused an application to rectify the register of shareholding of a company on the ground that the application was not made within a reasonable time after the applicant became aware of the facts entitling her to relief. The application was therefore be dismissed for laches. His Lordship Raja Azlan Shah J (as His Royal Highness then was) observed at p 203 as follows:

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> The applicant said that she became aware that her shares had been registered in her mother's name subsequent to her mother's death. That was in 1963. Letters of administration of her estate were granted to the last three respondents in July 1966.

> The present summons were taken out in December 1968. That was not done within a reasonable time after she became aware of the facts entitling her to relief. I am of the opinion that she is guilty of laches.

[27] In *Ong Ah Goh v Kuan Keh Lan & Ors* [1968] 2 MLJ 57 the High Court held as summarised in the headnotes as follows at pp 57–58:

> In 1917, the deceased fell ill and returned to China where he died in 1918. In 1924, the partners in the trading business equally divided the deceased share in the partnership property between his two sons. The plaintiff, a daughter of the deceased, commenced proceedings in 1966, as administratrix of the estate of the deceased for the administration of the estate. She claimed inter alia for a declaration that the share in the partnership property which she alleged had fallen into the hands of her two brothers as a result of their inter meddling with the deceased's estate, were held in trust for the estate, and for the recovery of her due share in the estate of the deceased.
>
> Held, ...
>
> (6) in the circumstances of the case the plaintiff was guilty of laches and acquiescence;

[28] Indeed his lamentable lapses into lethargy had led to the appellant registering himself as administrator against the title of the said land. The applicant is guilty of latches operating against him to deny him his claim now after a long lapse of some seven years delay from the date the consent order dated 8 March 2006 was served on 26 April 2006 on the applicant. The delay has not been sufficiently explained and cannot be excused in the circumstances of this case.

Whether O 42 r 13, O 3 r 5(1) and O 92 r 4 Rules of Court 2012 operate to aid the applicant in his application to set aside the order of court dated 8 March 2006 only on 26 February 2013

[29] As the applicant had made his application under O 42 r 13 of the Rules of Court 2012 ('the ROC'), it would be helpful to look at how the courts have interpreted that provision with respect to the time frame of 30 days. The strictness with which the court has viewed O 42 r 13 of the then Rules of the High Court 1980 ('the RHC') which is substantially the same as the current O 42 r 13 of the Rules of Court 2012 can be seen in the Court of Appeal decision in *Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 MLJ 209 at pp 214–215 where His Lordship Abdul Malek Ahmad JCA explained as follows:

> Order 42 rule 13 of the Rules of the High Court 1980 ('the RHC') specifically states that where provisions are made in the RHC for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment

must make his application to court and serve it on the party who has obtained the order or judgment within 30 days after the receipt of the order or judgment by him.

On 6 December 1993, Siti Norma Yaakob J (as she then was) struck out the statement of defence of the appellant (the defendant) and gave judgment for the respondent who was the plaintiff in the court below.

Learned counsel for the appellant was absent due to his clerk omitting to record the hearing date in the relevant diary.

The sealed copy of the order was served on the appellant on 3 February 1994. On 2 March 1994, the application to have that ex parte order set aside was filed by the appellant but it was served on the respondent only on 28 March 1994.

It was the contention of learned counsel for the respondent that the application to set aside the ex parte order did not comply with O 42 r 13 of the RHC as the appellant had taken more than 30 days after the receipt of the order or judgment to file the application and serve it on the respondent ...

The matter was eventually heard by Low Hop Bing J who held that the appellant's application had been made outside the time permitted under O 42 r 13 of the RHC and dismissed it with costs. For the considerations stated, saw no reason to disagree with him and accordingly dismissed the appeal with costs.' (Emphasis added.)

[30] The applicant had also asked for extension of time pursuant to O 3 r 5(1) of the ROC but the reasons given by the applicant do not justify such an exercise of discretion on the part of the court for the reasons stated above.

[31] Learned counsel for the applicant, Encik Hazlan had also relied on the inherent powers of the court under O 92 r 4 of the ROC to set aside the order of the High Court. Perhaps he might have in mind a situation akin to the case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 where the Federal Court had allowed a final order to be set aside on ground of illegality being in contravention of an express provision of a written law ie, s 13 of the Malay Reservations Enactment (FMS Cap 142). At p 409 Mohd Azmi FCJ (as he then was) explained that:

It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. *Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law'. the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction*. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party

could bring himself within the special exception. (Emphasis added.)

[32] Even when a consent order obtained is irregular, it was held by the Federal Court in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 36 as follows:

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justitiae, that is to say, irrespective of the merits and without terms. Having said that, it should be *added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity* (see O 2 r 2(i) of the Rules of the High Court 1980.) (Emphasis added.)

[33] Whilst it is true that the appeal should have been served on the applicant and that the applicant should have been heard, it is also true that after the order had been served on the applicant, he should not sit on his rights but that he should promptly apply to set it aside within the time frame provided under O 42 r 13 of the ROC. Even acceding for a moment that some extension of time is justified, the delay of seven years cannot in the circumstances of the case be condoned. Laches would operate to deny an indolent litigant of what he may be rightly entitled to if he had acted timeously.

[34] While the applicant has been guilty of both non-compliance with O 42 r 13 of the ROC as well as laches, I am prepared in the interest of justice to consider the application on its merits. I bear in mind that the decision of the High Court in an appeal from the decision of the collector under s 29(4) of the Small Estates (Distribution Act) 1955 shall be final and shall not be subject to any further appeal. I do so below.

Whether the deceased vendor can enter into an agreement to dispose of his interest in the said land by agreement of 13 August 1976 when he only became registered owner of the said land when the title was issued on 14 September 1988

[35] The applicant contended that at the time of the alleged sale and purchase agreement of 13 August 1976, the deceased vendor did not have any interest on the said land and so was in no position to dispose of that which he did not have. It is clear from the dealings of the parties ie both the deceased vendor and the deceased purchaser, that they knew what they contracted for.

[36] The land was designated as Lot No 7092, Tempat Rancangan Tanah Pinggir Ayer Ibol II, Mukim Lenggong, Daerah Hulu Perak, Perak measuring about 6 acres in the statutory declaration ('SD') of the deceased vendor dated 13 August 1976 (exh MIS 3 encl 13). It was also so stated in the sale and

purchase agreement of the same date (exh CCK 4 encl 15). It is true that the deceased vendor was not the registered owner of the said land at that time. However for all intents and purposes, the deceased vendor had been in possession of the said land. In both para 2 of the SD and recital 2 of the sale and purchase agreement it was stated as follows:

> (2) the Vendor states that in 1966, he willingly gave the said land to the Purchaser to cultivate and develop it. The Purchaser has since developed and planted rubber trees on the said land with his own money and expenses and the rubber trees on the said land are now about ten years old.

[37] There is no prohibition in law against a sale of an unregistered interest in land. Learned counsel for the appellant, Mr M S Raman, referred to the Court of Appeal case of *Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor* [2007] 1 MLJ 101 where at p 106 His Lordship Arifin Zakaria JCA (as the Chief Justice then was) in applying the Federal Court case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 held as follows at pp 105–107:

> [4] The main thrust of the appeal is that the sale and purchase agreement dated 1 February 1989 ('the 1989 agreement') between the second and third appellants on the one part and the respondents on the other part was invalid and void on three main grounds. Firstly, it is the contention of the appellants that on the date of execution of the 1989 agreement and the impugned Power of Attorney the subject land was yet to be registered in the name of second and third appellants. Based on s 88 of the Sabah Land Ordinance ('the Ordinance') the appellants claim that at the material time the second and third appellants did not have any right or interest over the subject land which is capable of being disposed by to first respondent. Section 88 of the Ordinance reads:
>
> No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.
>
> [5] This section came for consideration of the Federal Court in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12. Edgar Joseph Jr FCJ delivering the judgment of the court, after considering s 88 of the Ordinance stated at p 25:
>
> > Part V of the Land Ordinance provides for a modified Torrens system of land registration in Sabah and this section corresponds to the provision necessary in this system to ensure that no title to interests in land shall pass until the dealing has been registered. The language employed is somewhat different from that used in the majority of systems in use in the Commonwealth. The usual provision is to the effect that no instrument shall be effectual to pass any interest in land without registration and that, upon registration, the interest shall pass. See s 27 of the Land Titles Ordinance 1956 of Singapore for an illustration, and also the reference to the number of jurisdictions in which this provision exists set out in p 116 of *Hogg's Registration of Title to Land Throughout the Empire*. In

nearly all jurisdictions, however, notwithstanding variations in the language used, it has been held that these provisions do not render unenforceable contracts or agreements which would lead up to the execution and registration of instruments. Even the unregistered instrument itself may give a title in equity and an equitable right to enforce the agreement which must have existed between the parties when the instrument was executed. See *Abigail v Lapin* [1934] AC 491. Section 4 of the Selangor Registration of Titles Regulation 1891 employed what is probably the most sweeping language used in these provisions. That section provided that land comprised in a grant shall not be capable of being dealt with except in accordance with the statutory provisions and that 'any attempt' to deal with land except in this manner 'shall be null and void and of none effect'. Nevertheless, in *Haji Abdul Rahman v Mohamed Hassan* [1971] AC 209;; 1 FMSLR 290, the Judicial Committee of the Privy Council held that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while 'valueless as a transfer or burdening instrument' (at p 215) was good as a contract. It was said that it was not an 'attempt to transfer, but a conditional promise to transfer' (at p 214).

The language of s 88 is not nearly as sweeping as that of the Selangor provision. Moreover, its effect is confined to a new title or a dealing with, claim to, or interest in land. Following the foregoing authorities, and others too numerous to mention, in my judgment s 88 does not affect contracts or agreements otherwise valid and enforceable. As was pointed out in Abigail's case (at p 500), the provision for protection of unregistered interests by caveats shows that the legislation does not attempt to render all unregistered interests non-existent. What it does, is to prohibit the acquisition of a legal estate or interest in land except by registration of an instrument in the statutory form. Section 116 of the Land Ordinance of Sabah makes the usual provision for caveats which may be registered 'by any person claiming to be entitled to any interest' in any land. Obviously, such a provision is inconsistent with any interpretation of s 88 which involves holding that any agreements or other documents affecting land are of no effect and that only registration of the dealing in the land is to have legal validity at all.

For these reasons, I hold that s 88, notwithstanding the variation in language from that used in most jurisdictions, does not render this agreement for a lease invalid or unenforceable.

[6] On the above authority, it is our view that *even though on the date of execution of the 1989 agreement the second and third appellants did not have any registered right or interest in the subject land that does not render the agreement which is otherwise valid and enforceable to be void or invalid. We hold that second and third appellants at the material time have sufficient interest in the subject land to enter into a binding agreement by which they agreed to transfer the subject land when the title or interest in the subject has been registered in their names*. In other words the parties agreed that the agreement will only become enforceable the moment the second and third appellants' right or interest in the subject land is registered under the Ordinance. We find no difficulty with such an arrangement. For the above reasons, we find no merit in the first ground canvassed before us by the appellants. (Emphasis added.)

[38] Similarly I would hold that the deceased vendor had sufficient interest in the said land to dispose of it to the deceased purchaser. The land office recognised the deceased vendor's interest in the said land as can be clearly seen in the fact that when the then Pemungut Hasil Tanah of Lenggong issued its letter to the deceased vendor dated 29 December 1978, it asked for payment of premium for the said land and development expenses of RM7,280 (exh CCK 10 encl 15). I have no reason to doubt that these payments were effected by the deceased purchaser as the appellant had exhibited the receipts for the payments in CCK 11 in encl 15. The court can take cognisance of the fact that receipts for any payments effected to any Government Departments would normally be issued in the name of the person whose name is registered as the owner of the land or premises. The fact that these receipts are in the possession of the appellant speaks volume of the more than certain likelihood on the balance of probabilities that the deceased purchaser had effected the said payments.

[39] This is consistent with cl 2 of the sale and purchase agreement that reads:

> The Vendor shall have absolutely no claim, share, rights, property and interests of whatever nature in the said land as for the date of execution of this Agreement.

[40] Sure enough when the title to the said land was issued on 14 September 1989, it was issued in the name of the deceased vendor. The Lot No of 7092 as previously designated for the said land before the title was issued was also the same No PT in Lot 7092 in the issued title designated as HS(M) 94/88, No PT Lot 7092, Mukim Lenggong, Daerah Hulu Perak, Negeri Perak!

Whether based on the balance of probabilities the appellant had proved that the deceased purchaser had paid the full purchase price of the said land to the deceased vendor and that the deceased vendor was a bare trustee for the deceased purchaser

[41] The sale and purchase agreement was dated 13 August 1976. It was signed by the deceased vendor and the deceased purchaser and witnessed by an advocate and solicitor by the name of SA Lingam of No 19, Jalan Bandar Raya, Ipoh, Perak. Even at the time when the application was made on 30 March 2004 by the appellant for administration of the deceased vendor's estate under s 8 of the Small Estates (Distribution) Act 1955, the said document and the SD were more than 20 years old. The Evidence Act 1950 provides for a certain presumption bearing in mind that witnesses might be difficult to trace after such a long lapse of time and signatories of the document might have left this world for good. Here both the vendor and purchaser under the sale and purchase agreement had died. The vendor died on 19 January 1992 (exh CCK 3 encl 15). The purchaser died on 7 September 1998 (exh CCK 7 encl 15). Section 90 with its illustrations reads:

90 Presumption as to documents twenty years old

Where *any document purporting or proved to be twenty years old is produced from any custody which the court in the particular case considers proper*, the court may *presume that the signature and every other part of that document which purports to be in the handwriting of any particular person is in that person's handwriting*, and in the case of a *document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested*.

Explanation—Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

ILLUSTRATIONS

(a) A has been in possession of landed property for a long time. He produces from his custody documents relating to the land, showing his title to it. The custody is proper.

(b) A produces documents relating to landed property of which he is the chargee. The chargor is in possession. The custody is proper.

(c) A, a connection of B, produces documents relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper. (Emphasis added.)

[42] It is of course a rebuttable presumption. What evidence has the applicant adduced to say that the deceased vendor could not have signed the sale and purchase agreement? The applicant said that the signature of the deceased vendor is different from the one found in a document made in 1984. As there is a long lapse of about eight years, in the absence of contemporaneous signature during the time of execution of the sale and purchase agreement, that by itself is not sufficient to rebut the presumption.

[43] The stamp on the SD and the sale and purchase agreement looked genuine enough. The SD has the seal of a stamp in two round concentric circles with the date '18VIII76' printed in the centre of the inner circle and the words 'PEJABAT SETEM IPOH' on the inner rim of the concentric circles. Then there is the squarish printed stamp bearing the words 'MALAYSIA' ,'$2' and 'TELAH BAYAR'. There is also a similar stamp in the sale and purchase agreement.

[44] The court is of course entitled to look at the surrounding circumstances to see if the document has an honest face. The fact is that the deceased purchaser had been in occupation of the said land and cultivating the said land with rubber trees. The appellant could produce the receipts for the

development expenses imposed by the authorities. The applicant did not take any action to apply for administration of the said land until the appellant applied for letters of administration of the said deceased vendor's land in 2004. One wonders why the applicant, having the title issued in the name of his late father in 1988, did not apply for administration of a 6.2 acre land planted with rubber trees even after the death of his father on 19 January 1992. The applicant contended that if his late father had sold the said land to the deceased purchaser, he would have told him about it. However that is just a conjecture which could well be a valid factor in favour of the appellant. It could well be precisely because the deceased vendor had no more interest in the said land, which was why he did not bother to inform the son about it. Moreover the deceased vendor had acknowledged that the deceased purchaser had been in occupation of the said land since 1966. At the time when the deceased vendor parted with all his interest in the said land, the applicant was only eleven years old. One wonders why a father would want to bother his eleven years old son with what appeared to be a business decision.

[45] The title when issued would presumably be issued to the deceased vendor. However there is no evidence that the deceased vendor ever paid the quit rent from 1988 to the time of the vendor's death in January 1992. The likelihood is that the vendor did not pay as he knew only too well that he had no more interest in the said land. The applicant only started to pay quit rent from 1992–2003, the year the application for administration was made by the appellant, presumably after having discovered the title in the name of his deceased father.

[46] The sale and purchase agreement was witnessed by an advocate and solicitor and the SD affirmed before a commissioner for oaths by the name of Encik Abu Zal bin Hj Osman. Both the SD and the sale and purchase agreement stated that the sum of RM7,000 had been paid as the purchase price of the said land. There is also the receipt for RM7,000 dated 13 August 1976 signed by the vendor or what purported to be his signature. There was also a crossed affixed stamp of ten cents.

[47] I conclude that on a balance of probabilities both the SD and the sale and purchase agreement have a ring of truth round them and that these documents do have an honest face. I would echo the words of and follow the approach taken by His Lordship KC Vohrah J (as he then was) in *Ghazali bin Arifin v Ahmad bin Bakar & Ors* [1992] 1 MLJ 282 where on facts not too dissimilar, His Lordship observed as follows at pp 285–286:

> In this case it is pleaded by the plaintiff that his father Ariffin bin Osman purchased from one Bakar bin Awang Ahmad a third of Bakar's undivided share, ie 1/3 of 4461/4609th share of the land held under SP 9920, Lot 355, Mukim Bukit Pinang, Kota Setar, Kedah. The defendants are presently registered as owners of the said

share. The plaintiff seeks a declaration that the defendants are bare trustees of the said share and for an order that the defendants do execute a transfer of the said share to him as administrator of the estate of Ariffin bin Osman, deceased.

The land was alleged to have been purchased pursuant to a sale and purchase agreement dated, according to the Muslim calendar, 11 June 1374. This date corresponds with the Gregorian calendar date 3 February 1955.

Both Ariffin bin Osman and Bakar bin Awang Ahmad have died. The plaintiff is the son of Ariffin and the administrator of his estate. The fifth defendant, widow, and the other defendants, the children, of Bakar, are beneficiaries of Bakar's estate and are the registered owners of the said share in the land.

The purported sale and purchase agreement was tendered in court. The words 'Kota Star Stamp Office' (in English) are imprinted on two 25 2 stamps. The date '3.2.55'. and, below it, the word 'PAID' (in English) appear as perforations on the said two 25 2 stamps affixed to the right top side of the document. I have no hesitation in accepting that the document was officially stamped at the Kota Star Stamp Office on 3 February 1955 and I am satisfied that the document has been proved to be more than 20 years old.

Having regard to s 90 of the Evidence Act 1950 the court may presume the genuineness of the signatures of the purported vendor and purchaser and the thumbprint of the purported person who witnessed the execution of the agreement. One would expect such a document to have been in the custody of the plaintiffs father. It was; the plaintiff said that he took it from his father's belongings. *I should be satisfied that the document was executed by the plaintiff's father and the first defendant's father as shown in the agreement, considering that the document does appear to have an honest face*.

I have to point out, however, that there is one feature in the document which needs further investigation. It relates to the date on which the document was allegedly executed, the same date that it was stamped, ie 3 February 1955. The point is that this date is the very same date on which the alleged vendor of the land, the first defendant's father, Bakar bin Awang Ahmad, died. This fact appears as a statement of fact under para 9 of the statement of claim of the plaintiff. What should I make of this? Section 90 of our Evidence Act 1950 is substantially similar to s 90 of the Indian Evidence Act though the presumption therein is in respect of documents 30 years old. If there is a dispute as to the genuineness of such documents (having regard to s 90 of both the Malaysian and Indian Acts) one needs to heed what *Madgavkar J said at p 40 in Mansukh Panachand Shah v Trikambhai Icchabhai,* AIR 1930 Bom 39 after he had referred to the Privy Council case of *Shafiqunnissa v Shaban Ali Khan:* (1904) 26 All 581 ... *it is necessary, therefore, for the courts to consider the evidence external and internal of the document in order to enable them to decide whether in any particular case they should or should not presume proper signature and execution*.

As I have stated earlier the document has an honest face and there is only the question of the date. Is it too much of a coincidence that the vendor died on the day that the document was executed? There is, however, no evidence as to the time when Bakar died. And there is nothing to indicate that he could not have signed the

document because he had died earlier. On the other hand the evidence shows that the purported purchaser of the land, Ariffin, had the document of title in respect of the land in his possession until he himself died in 1984. The inference is that having regard to the common course of natural events Bakar must have passed it to him. Then again there was evidence from both the plaintiff's witnesses, 76 year old Mat bin Jasin (PW2), and the third defendant, Che Ani bin Bakar (DW3), that Ariffin was in occupation of the land after Bakar had died. PW2 said that he saw Ariffin clearing the land and he also said that Ariffin told him that he had bought the land. Further there is no evidence of any claim to the said share in the land by any of the two wives of Bakar or any of his children until 28 years had passed from the date of death of Bakar. This was when the first defendant at the age of 45 years applied for and was granted letters of administration by the collector of Land Revenue in respect of his father's estate. He was granted letters of administration in 1983. And the evidence was that the alleged purchaser Ariffin was still alive at that time but there is no clear evidence whether he or his son, the plaintiff, was aware of the application for the said letters of administration by the first defendant. The plaintiff was not questioned about this and my view is that in all probability neither Ariffin bin Osman nor the plaintiff knew about the application. What is clear is that the plaintiff was requested in writing by the first defendant on 9 February 1985 to bring the land title to the Land Office Kota Star on 23 February 1985 at 10am after the letters of administration had been granted to the first defendant in 1983.

Bearing all these in mind I think that the suspicion that the document may be a tainted document because of the coincidence of the date of execution of the agreement and the date of death of Bakar bin Awang Ahmad is unfounded. And I can and do accept that the signatures and the thumbprint appearing in the document are those of the persons who are named therein and who purportedly made them and that the agreement was properly executed. (Emphasis added.)

[48] I would similarly hold that on a balance of probabilities and applying the presumption in s 90 of the Evidence Act 1950, the signatures purported to be that of the vendor and the purchaser are genuinely that of the vendor and purchaser and that the attesting signature of the witnesses in both the SD and the agreement are that of the respective commissioner for oaths and the advocate and solicitor respectively. Further based on both the extrinsic and intrinsic evidence of the said documents, the contents have a ring of truth around them and an honest face.

Whether the deceased vendor was a mere bare trustee for the deceased purchaser

[49] Having held the contents of the SD and sale and purchase agreement to be true on the balance of probabilities, the question is what is the position of the vendor vis a vis the purchaser who had paid the vendor the full purchase price of the said land, in this case the sum of RM7,000 as evidenced in cl 1 of the sale and purchase agreement, para 3 of the SD (exh MIS 3 encl 13) and the receipt of 13 August 1976 (exh CCK 9 encl 15)?

[50] In *Hon Ho Wah & Anor v United Malayan Banking Corp Bhd* [1994] 2 MLJ 393 the Supreme Court held that the appellants, having paid the full purchase price for the two apartment units to the developer, the developer held the interest in the two apartment units as bare trustees of the appellants.

[51] The appellants also had taken possession of the two apartment units. His Lordship Harun Hashim SCJ observed as follows at pp 397–398 as follows:

> It follows that the bank, as chargee, ceased to have any legal interest in the lands on 29 July 1991. On that date, the beneficial interest in the land had passed to the developer, who on 2 and 3 August 1991, executed the sale and purchase agreements with the appellants, respectively. The appellants paid the full purchase price on 8 and 9 August 1991 and from then on, the developer held the interest in the two apartments as bare trustees of the appellants: see *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 at p 483 where it was held, following *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors,* [1974] 2 MLJ 45 *that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the purchasers, are deemed to be bare trustees for the purchasers*. Temenggong Securities in turn followed *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116. In the present case, the appellants had entered into possession of the two apartments before the purchase. It is true that under the Torrens system, the register is everything: *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 (at p 12) but only prima facie. Here the appellants were aware of the charge but before executing the sale and purchase agreements, they were shown by the developer the bankslips of payment to the bank and the two letters from the Bishop. On top of that, s 2.02 of the sale and purchase agreement making reference to a charge of the land to a bank was deleted and signed by both parties. The delay in presenting the discharge of charge for registration until 23 August 1991 does not therefore affect the equitable rights of the appellants. (Emphasis added.)

[52] The Federal Court in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 at p 29 observed as follows:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, *for the purchaser*, is on completion, that is to say, upon receipt *by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser*, for it is then that the vendor divests himself of his interest in the land. (Emphasis added.)

[53] Though there is the additional requirement of not just the full purchase price being paid but also that the vendor has duly executed a valid and registrable transfer of the land in favour of the purchaser, much would depend on the facts of each case and the contractual variation that the parties may

introduce into the sale and purchase agreement. In the present case, the individual title had not been issued yet. Moreover the vendor had already agreed in cl 7 of the sale and purchase agreement as follows:

> The vendor shall execute a valid registrable memorandum of transfer of the said land to the Purchaser within seven days after a permanent title deed or any other title deed to the said land has been issued by the State Government of Perak.

[54] Furthermore in cl 3 of the sale and purchase agreement it is declared as follows:

> As from the date of execution of this agreement, the purchaser shall become the sole beneficial owner and possessor of the said land and the vendor shall hold the said land as trustee for the purchaser till he has executed a valid registrable transfer of the said land to the purchaser.

[55] The purchaser here had also entered into occupation, possession and even cultivation of the said land with rubber trees. I have no hesitation that in the circumstances of the case, the deceased vendor was a bare trustee for the deceased purchaser.

Whether limitation applies in the circumstances of the case to prevent the appellant from applying for administration of the estate

[56] The applicant submitted that the appellant's action in applying for administration is in reality an action to recover land and that the action must be brought within twelve years from the date of accrual of action. Assuming that the deceased purchaser should have known that the title was issued in 1988, the action should have been brought in 2000 but the application for administration was brought only in 2004. Section 9(1) of the Limitation Act 1953 reads:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

[57] With respect I cannot agree. An application for administration of the estate of a deceased is not an action to recover land. In any event the deceased purchaser and his administrator in the appellant were in possession of the said land. As was held in *Ghazali bin Arifin* at pp 287–288:

> The evidence adduced on behalf of the defendants have failed to show that Bakar did not sell 1/3 of his share of the land to the plaintiff's father. In fact the evidence of the first, second and fourth defendants did not show whether or not there was a such sale. And the evidence, adverted to earlier, shows that the plaintiff's father was in occupation of the land till his death and that the document of title to the land was in his possession till his death. *The evidence on the balance of probabilities shows that*

the plaintiff's father was the equitable owner of the land; and 'what is required now is to clothe the equitable estate with a legal title' (per Raja Azlan Shah J (as His Majesty then was) in *Munah v Fatimah* [1968] 1 MLJ 54 at p 55. The defence contends, however, that the action is statute-barred.

[58] In *Tengku Mariah binte Sultan Sulaiman v Halimah binte Abdullah* [1980] 2 MLJ 234 the contention too was that the action by the plaintiff was statute-barred but Syed Othman FJ, delivering the judgment of the Federal Court, at p 235 said:

In our view the respondent's action is not affected by limitation by reason of her having been in possession of the land from the time of purchase, and the present case fits squarely with the principle laid down by Raja Azlan Shah J (as he then was) in *Munah v Fatimah* where he said:

> The legal position is that there is an ordinary contract for the sale of land, ... Relying on the contract the plaintiff went into occupation and did such acts as were necessary and relevant to show that she was in possession. She never got off the land. As from that time, it seems to me, that she was the equitable owner of the said land. What is required now is to clothe the equitable estate with a legal title. She therefore seeks the aid of this court. In my opinion she is well entitled to the relief she claims.

In dealing with the contention by the vendor that the action was statute-barred (as in the present case), Raja Azlan Shah J following his earlier decision in *Kersah La'Usin v Sikin Menan* [1966] 2 MLJ 20 relied on the English authority, *Williams v Greatrex* [1957] 1 WLR 31 where Denning LJ (as he then was) said at p 36:

> ... once the purchaser went into possession of the land having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance.

This principle has been adopted by this court in *Othman & Anor v Mek* [1972] 2 MLJ 158

Thus the contention that the action by the plaintiff is statute-barred cannot stand. In all the circumstances the plaintiff succeeds in his claim. The court declares that defendants are bare trustees of the said 1/3 of 4461/4609th undivided share in the land comprised in SP No 9920, Lot 355, Mukim Bukit Pinang, Kota Setar, Kedah and are therefore bound to convey the same to the plaintiff, and orders that the defendants execute a legal valid and registrable transfer of the said undivided share in the said piece of land in favour of the plaintiff as the administrator of the estate of Ariffin bin Osman failing which the senior assistant registrar is empowered to sign the memorandum of transfer on behalf of the defendants in favour of the plaintiff. Costs to the plaintiff. (Emphasis added.)

[59] Further at any rate, as the deceased vendor was a mere bare trustee of the deceased purchaser, there is no limitation bar for a beneficiary to enforce a trust. Section 22(1) of the Limitation Act 1953 provides as follows:

> Section 22 Limitation of actions in respect of trust property.
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) *to recover from the trustee trust property* or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use. (Emphasis added.)

[60] I can do no better than to draw from the illumination and insight provided by Her Ladyship Nallini Patmanathan J in *Abdul Razak Sheikh Mahmood & Anor v Bhupinder Singh s/o Avtar Singh & Ors* [2012] 3 MLJ 348; [2012] 2 AMR 129 as follows:

> [34] The plaintiffs here in like manner seek to rely on s 22(1)(b) of the Limitation Act 1953 which prescribes that no limitation period is stipulated in the Act for the recovery of trust property from a trustee. Extrapolated to the present context, the plaintiffs argue that D1-D6 and D7 and/or D8 are the trustees who hold the Fabrika Technology Sdn Bhd shares and the shop house on trust for them as beneficiaries. Accordingly they contend that the limitation period prescribed in s 6 does not apply to preclude their claim as they fall neatly within s 22(1)(b). The textbook *Lewin on Trusts* (18th Ed) in the opening passages of chapter 44 on Limitation of Actions states, in relation to the policy of the English Limitation Act 1980 which has sections equipollent to the Limitation Act 1953 in Malaysia, and is therefore arguably applicable here, as follows:
>
> > ... Very broadly, the policy of the Act is to accord special treatment to cases in two categories: first, no protection is to be given for a fraudulent breach of trust and, secondly, *a trustee is never to be allowed to keep trust property for himself. The Act therefore provides that no period of limitation prescribed by it should apply to claims in either category, which are left subject to no limitation period at all.* In other cases, there is a six year time limit for bringing an action ...
>
> [35] As s 22(1)(b) is pari materia with s 21(1)(b) of the English Act, the foregoing reasoning as to the policy behind the statute appears entirely cogent. In the instant case therefore the plaintiffs maintain that they have founded their claim essentially on the existence of a trust whereby the defendants have in their possession trust property belonging to the plaintiffs as beneficial owners. There is, therefore, no limitation period prescribed they maintain, for the recovery of their own property held in trust for their benefit. (Emphasis added.)

Whether the decision of the collector in granting administration to the applicant ought to be set aside

[61] The reasons given by the collector in dismissing the application for administration by the appellant and granting it instead to the applicant can be summarised as follows (exh MIS 4 encl 13): A

> 8.1 At the time when the sale and purchase was made on 13 August 1976 when the agreement was signed, the status of the said land was still under state ownership as the title has not been issued yet. B
>
> 8.2 After the title was issued on 14 September 1988 the said land was subject to a restriction in interest in that the said 'land cannot be transferred or leased without the consent of the Menteri Besar'.The restriction is to prohibit any sale before obtaining the consent of the Menteri Besar. In this case there has been a breach of the condition when the agreement was executed. C
>
> 8.3 After the title was issued in 1988 there was no effort taken by the purchaser to require the vendor to transfer the said land even until the purchaser died on 7 October 1998. The lapse of 10 years is too long a time to take any action with respect to the transfer. It reflects the fact that the purchaser was not interested in enforcing his right as a purchaser. D
>
> 8.4 The quit rent was paid by the beneficiaries of the vendor since the vendor died on 19 January 1992 until 2004. The quit rent for 2004 and 2005 was paid by the beneficiaries of the purchaser. E
>
> 8.5 The said land was abandoned without any development by any one after the death of the vendor.
>
> 8.6 Based on the reasons given above I made the decision to grant Letters of administration to the son of the deceased vendor ie Mohamad Iqbal Shah bin Abdullasah. F
>
> 8.7 This decision to grant administration to Mohamad Iqbal Shah bin Abdullasah does not mean that the said land is owned by only Mohamad Iqbal Shah bin Abdullasah as he is only an administrator of the said land. In other words the said land was the deceased vendor's land. G

[62] As can be seen, the collector was unduly influenced by the fact that the deceased vendor had no title to the said land when the agreement was signed. That should not have been a problem as discussed above since the vendor could always contract to dispose of his inchoate interest in the said land or for that matter, his right to the said land. H

[63] As for the fact that no consent of the Menteri Besar had been obtained, that again is for the vendor to apply as provided in cl 6 of the sale and purchase agreement as follows: I

> In the event the prior consent in writing of the Honourable Menteri Besar of Perak or any other appropriate authorities or persons is required for the transfer of the said land to the Purchaser, the Vendor shall take all the necessary legal and other steps and proceedings to have the said land registered in the name of the Purchaser as

A expeditiously as possible so that he could fulfil his obligations to execute a valid registrable transfer of the said land to the name of the Purchaser.

[64] The applicant has not shown that the deceased vendor had applied for the consent of the Menteri Besar and the consent has been rejected. As the title B was only issued in 1988 and the vendor had died in 1992, it could not be said that there has been an undue delay in getting the said land registered in the purchaser's name. In fact it is not certain if the purchaser knew of when the title was issued as he had already gone into possession of the said land and cultivating the rubber trees. The purchaser himself died in 1998. Between C 1992 and 1998, one would have expected the children of the deceased vendor to have come forward to apply for administration of the deceased vendor's estate. Again after 1998, nothing was done by the vendor's children with respect to administration until the appellant as administrator of the estate of D the deceased purchaser applied for administration.

[65] Whilst the collector was perturbed by the fact of inaction of the purchaser from 1988 to 1998 when the purchaser died with respect to getting the said land registered in his name, the collector should also have asked himself E and perhaps be equally if not more perturbed by the fact that since the vendor died in 1992, none of his children has applied for administration until 2004 when the appellant applied for administration and the applicant was heard before the collector. It is to be noted that there was no cross application by the applicant for grant of letters of administration to the estate of the deceased F vendor.

[66] The collectors ad made no finding on the sale and purchase agreement of 13 August 1976 produced by the appellant, the SD and the receipt of the RM7,000 paid as purchase price of the said land. No proper consideration had G been given to the fact that land premium and the development expenses of RM7,280 for the period of about ten years before the title was issued had been paid in all likelihood by the purchaser, for it was the appellant who produced the receipts.

H

[67] The fact that the High Court had by consent allowed the appellant to be the administrator of the said land does not mean that he can get the said land registered in the name of the deceased purchaser's beneficiaries without the consent of the Menteri Besar. At the appropriate time when registration is to be I applied for, the relevant consent of the Menteri Besar would still have to be obtained.

[68] For all the reasons stated above the decision of the collector cannot be sustained and ought to be set aside.

PRONOUNCEMENT

[69] In the circumstance I had affirmed the order made on 8 March 2006 in allowing the appeal of the appellant against the decision of the collector and in granting letters of administration to the appellant with respect to the said land registered in the name of the deceased vendor.

[70] The court also ordered all quit rents paid by the deceased vendor or the beneficiaries which has not been paid by the appellant since his occupation of the said land to be paid forthwith to the applicant at RM62.50 per year from 1992 till 2003.

[71] As the appellant himself has contributed to the delay in this proceeding and as he had not joined the intervener/applicant as a party to the appeal, I had ordered costs of RM5,000 to be paid by the appellant to the intervener/applicant.

Appeal allowed with costs of RM5,000.

Reported by Afiq Mohamad Noor